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## PP v. JAFPERI NOOR & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[CRIMINAL TRIAL NO: WA-45SOM-4-11-2021]
24 APRIL 2024

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**Abstract** – *To establish a charge of smuggling of migrants, pursuant to s. 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, it is incumbent on the prosecution to prove that: (i) the migrants involved are smuggled migrants; and (ii) the accused persons had assisted in the smuggling of the migrants. The requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence.*

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***CRIMINAL LAW:*** *Offences – Smuggling of migrants – Premises raided led to arrest of migrants – Accused persons charged for having common intention of smuggling migrants – Offence under s. 26A of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 read together with s. 34 of Penal Code – Whether ingredients of charge established – Whether migrants were smuggled migrants – Whether accused persons assisted in smuggling of migrants – Whether common intention established*

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***CRIMINAL LAW:*** *Common intention – Smuggling of migrants – Premises raided led to arrest of migrants – Accused persons charged for having common intention of smuggling migrants – Offence under s. 26A of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 read together with s. 34 of Penal Code – Whether common intention established*

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An apartment unit was raided and seven Indonesian nationals ('seven migrants') were arrested for offences under the Immigration Act 1959/63, namely (i) s. 6, for not having a valid pass to enter Malaysia; and (ii) s. 15, for overstaying in Malaysia. According to the seven migrants, the first accused was the person who: (i) provided them with accommodation at the premises; (ii) arranged the transportation to and from the Kuala Lumpur International Airport 2 ('KLIA2') and the premises; (iii) facilitated and obtained the special pass for their passports; and (iv) purchased and provided them with the flight tickets. Further investigations led to the discovery that the apartment was rented and registered under the first accused's name and the involvement of the second accused. The accused persons were charged for the offence of having the common intention of smuggling migrants, pursuant to s. 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('Act') read together with s. 34 of the Penal Code. The prosecution's narrative revealed that (i) the first accused had given his house keys to the seven migrants for them to stay; (ii) in cases where Indonesians wished to return to Indonesia, the second accused would charge RM100 for getting the special pass chops. The second accused had helped the first

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accused to obtain a special pass chop for the seven migrants to exit Malaysia through KLIA2; (iii) in order to ensure communications between him and the seven migrants, the first accused had created a WhatsApp group called 'Pulang 18 Jun 2021' for all the seven migrants; and (iv) during the last dealing between the accused persons, the arrangement for the exit of the seven migrants was unsuccessful as some operation was being carried out. On the other hand, it was the defence's case that, at the time when the seven migrants were in the process of exiting Malaysia, the Malaysian Government had initiated the 'Program Rekalibrasi Pulang' ('programme') where migrants, who had been charged for offences of not having a valid pass and overstayed in Malaysia, were qualified to participate and could just walk-in to the special counter; the seven migrants were eligible to participate in the said programme.

**Held (discharging and acquitting accused persons without calling them to enter their defence):**

**(1)** In the screenshots of the WhatsApp communications between one of the seven migrants ('Bulkaini') with the accused, there was a letter relating to the programme forwarded to Bulkaini by the first accused. Reasonable doubts arose. The question that arose was whether the first accused was facilitating the exit of the seven migrants from Malaysia illegally when there was a letter relating to the programme, which legitimised the return of all illegal immigrants, forwarded by the first accused to Bulkaini. This letter was not extracted and produced by the prosecution and what the first accused had to say or had said regarding the letter was also not extracted by the investigating officer. The reasonable doubt was further compounded by the fact that, even in the first accused's statement, he had stated that his purpose of creating the WhatsApp group was to inform migrants who contacted him any information regarding the programme, as well as informing them about the vacancies of the Sistem Temujanji Online in any immigration office. Based on the voluminous extracts of the WhatsApp communications of the seven migrants, it was apparent that there were discussions between them regarding the programme. In other words, it could safely be inferred that the seven migrants did intend to participate in the programme with the assistance of the first accused. No evidence was adduced by the prosecution to show that the seven migrants were not entitled to the protection or exception under the programme. (paras 29 & 30)

**(2)** The prosecution's contention that the special chip in the seven migrants' passports were fake or forged was never proven. Furthermore, none of the seven migrants were charged for forging the endorsement of the special pass chops on their passports. The seven migrants must be given the benefit of the doubt. If they had valid special pass chops, which could only be verified by someone from the division which handled the programme, and they were applying to participate in the programme,

could they still be considered as smuggled migrants under the law when they sought assistance from the first accused to exit Malaysia through a valid channel? There was also no evidence to show that it was the first accused who had prepared the 'Surat Perjalanan Pelaksana Passport' or the special pass chops found in the passports belonging to the seven migrants. (paras 33, 34 & 39)

**(3)** The fact that it was the first accused who had bought the flight tickets earlier for the seven migrants could not be said to be proof that the first accused was facilitating the exit of the seven migrants illegally or that the first accused knew or had reasons to believe that he was facilitating their exit illegally as it was clear from the situation that the seven migrants were confirmed to have come under the exception of the programme and having a return flight ticket was one of the conditions to return home under the programme. Since the programme was a programme allowing the seven migrants to return to their country legally and there was evidence to show that the first accused did forward the letter relating the same, the first accused had not committed any act of smuggling, as defined under s. 2 of the Act, by using any illegal or unlawful means to facilitate the departure of the seven migrants. (paras 40 & 42)

**(4)** In regards to the second accused, the only evidence that the prosecution relied on was the statement by the first accused that he had sought the assistance of the second accused relating to the seven migrants' return to their country. It was said that the second accused was responsible in 'setting up' the immigration counter at KLIA2. However, nowhere in the evidence adduced showed the involvement of the second accused. The prosecution failed to prove that the accused persons had, in any way, communicated, planned, arranged or facilitated the exit of the seven migrants illegally. Therefore, the second accused could not be said to have known or had reasons to believe that the seven migrants' exit was illegal or unlawful. (paras 43 & 47)

**(5)** Gaps existed in the unfolding of the prosecution's case in its entirety. Reasonable doubts which existed were not negated by the prosecution. The guilt of both accused persons were not convincing. The accused persons were discharged and acquitted without them having to enter their defence. (paras 49 & 50)

**Case(s) referred to:**

*Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA* ***(refd)***

*Magendran Mohan v. PP [2011] 1 CLJ 805 FC* ***(refd)***

*Mohammad Jafor Hossain lwn. PP [2017] 8 CLJ 717 HC* ***(refd)***

*Muhammad Hafiz Mukrimin Abdulkeh lwn. PP & Satu Lagi Rayuan [2022] 4 CLJ 329 CA* ***(refd)***

*Yugarajan Letchimanasamy & Anor v. PP & Another Appeal [2020] 7 CLJ 372 CA* ***(refd)***

**Legislation referred to:**
Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss. 2, 26A, 61A
Evidence Act 1950, s. 114(g)
Immigration Act 1959/63, ss. 6(1), 15(1)(c), 32, 33, 56(2)
Penal Code, s. 34
Security Offences (Special Measures) Act 2012, s. 18A

*For the prosecution - Nor Amalina Ismail; DPP*
*For the 1st accused - Amirul Ridzuan Hanif, Nur Syafiah Athirah Ahmad Syafique & M Izzat Irfan Taib; M/s The Law Office of Amirul & Athirah*
*For the 2nd accused - Shalvin Kanvinchelvan; M/s Gabriel Susayan And Partners*

*Reported by Najib Tamby*

## JUDGMENT

**Noorin Badaruddin J**

**[1]** The accused persons, Jafperi bin Noor ("first accused") and Rohani ("second accused") were charged under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ("ATIPSOM") with the following offence:

> Bahawa kamu bersama-sama pada 22.6.2021 jam lebih kurang 10.15 malam di sebuah kediaman Kuarters Penjawat Awam yang beralamat di No C-09-07, Jalan Kasturi P17 (Jalan P17), Presint 17, 62100 Putrajaya, di dalam Wilayah Persekutuan di Putrajaya dalam mencapai niat bersama kamu telah menjalankan penyeludupan migran ke atas:
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> 1. MARIDAR/P/IDN/25.05.1970/NO.PPT: TIADA (AKUAN LISAN) (B1)
> 2. LUKMAN/L/IDN/30.12.1995/NO.PPT: TIADA (AKUAN LISAN) (B2)
> 3. MAHDI/L/IDN/20.06/1994/NO.PPT: C1248931 (B3)
> 4. ZULHADI/UIDN/11.10.1989/NO.PPT: B8708529 (B4)
> 5. MUKTARUDDIN/L/IDN/02.01.1988/NO. PPT: C3658315 (B5)
> 6. TEUKUZULFIKAR/L/IDN/18.11.1975/NO.PPT: 04169522 (B6)
> 7. BULKAINI/L/IDN/27.03.1997/NO.PPT: C3658400 (B7) yang merupakan warganegara Indonesia. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah Seksyen 26A Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007 yang boleh dihukum di bawah Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

**[2]** The migrants stated in the charge will collectively be referred to as "the seven migrants".

**[3]** The prosecution called a total of 20 witnesses to prove a *prima facie* case against both the accused persons.

**[4]** In the opening speech, it was the case for the prosecution that both the accused persons in furtherance of their common intention had given shelter to the seven migrants named in the charge at the address stated in the charge for the purpose of their illegal exit from Malaysia *via* the Kuala Lumpur International Airport 2, Sepang ("KLIA2"). It is the prosecution's case that the seven migrants have committed the offence of staying without valid documentation and had overstayed in Malaysia. The prosecution stated that the seven migrants had obtained assistance from both the accused persons to arrange for their illegal exit from Malaysia to the International Airport Medan-Kualanamu, Indonesia *via* KLIA2.

**Narrative Of Prosecution's Case**

**[5]** On 22 June 2021, at around 10.15pm, based on information received from the public, PW1 and his team headed to and raided an apartment unit the address of which is as stated in the charge ("the premise"). Seven Indonesian nationals were arrested at the premise. PW1 then lodged a police report (P4) and the items seized from the premise are listed in P5 and P10. Meanwhile, P124, P143 and P144 are photographs of the premise and the items seized.

**[6]** The premise was rented and registered under the first accused's name who was then a civil servant attached at the economic planning unit at the Prime Minister's Department.

**[7]** The seven migrants were arrested for offences under s. 6 (not having a valid pass to enter Malaysia) and s. 15 (overstaying in Malaysia) of the Immigration Act 1959/63 [Act 155] (P116 and P155A).

**[8]** Upon further investigation, the first accused was arrested on 23 June 2021 at around 9.30pm at his family home in Kota Bahru Kelantan by a second raiding team led by PW3. The arrest report was marked as P79 and the items seized from the second arrest location are listed in P80.

**[9]** On 27 June 2021 at around 9.50pm, PW11 and his team arrested the second accused at Supermarket Pasar Segar Syifa located at 8-G, Jalan LP 7/5, Taman Lestari Perdana, 43300 Seri Kembangan Selangor. The arrest report was marked as P90 and the items seized were listed in P91.

**[10]** Relying on the depositions taken from the seven migrants under s. 61A of the ATIPSOM (P157, P159, P158, P160, P161, P162 and P163), the first accused was identified and confirmed as the person who provided the seven migrants with accommodation at the premise. The first accused was also stated to have had arranged the transportation to and from the KLIA2 and the premise. The first accused was identified by the seven migrants to be the person who facilitated and obtained the special pass for their passports (P156A), purchased and provided them the flight tickets (P146 and P147) as well as obtaining the COVID-19 screening letters under their names (P148).

**[11]** The prosecution relied on the statement obtained from the first accused (P145) dated 9 July 2021 where the first accused had identified all the seven migrants and gave his house keys for them to stay. The first accused also confirmed that he knew the second accused whereby the latter had previously helped him to obtain special pass chop for Indonesian nationals. The last dealing the first accused had with the second accused was on 18 June 2021 where the latter had helped him to arrange/facilitate the seven migrants to exit Malaysia through KLIA2.

**[12]** The first accused further stated that in order to ensure communication between him and all the seven migrants to exit Malaysia, he had created a WhatsApp group called "Pulang 18 Jun 2021" for all the seven migrants. In this WhatsApp group, the first accused gave out information and details to the seven migrants to facilitate their exit from Malaysia through KLIA2 and all preparations and arrangements by the first accused can be seen from the WhatsApp communication screenshots obtained from all the seven migrants in P122.

**[13]** In P154, the second accused stated that on 18 August 2021, in cases where Indonesian wants to return to Indonesia, she would charge the amount of RM100 for getting the special pass chops, COVID-19 screening letters and for the arrangement of setting up with the immigration counters at the airport. The second accused stated that the first accused contacted her to meet up in order to arrange for the exit of Indonesians from Malaysia through the airport.

**[14]** In her statement, the second accused confirmed that the last dealing she had with the first accused was on 18 June 2021 whereby the first accused seek her assistance to set-up the immigration counter at the airport for the Indonesians. However, the arrangement was unsuccessful as there was some delay on that day to which she referred to as "line tak clear" at the airport. This situation was confirmed by the seven migrants in their depositions where they were told by the first accused that they cannot proceed to the departure Hall in KLIA2 as there was an operation/"Ops" being carried out and were told that "line panas", although they have checked-in their luggage for their flights.

**[15]** According to the prosecution, both the accused persons knew or had reason to believe that the exit of the seven migrants from Malaysia was unlawful and they have provided assistance and services for purposes of arranging, organising and facilitating the exit of the seven migrants whom are said to be smuggled migrants from Malaysia *via* KLIA2.

**The Law**

**[16]** At the close of the prosecution case, the court must undertake a maximum evaluation of evidence adduced by the prosecution to determine if the prosecution has proven a *prima facie* case against the accused. If a

reasonable doubt is created, it would mean that the prosecution has failed to prove a prima facie case. See *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 MLJ 65, [2002] 2 MLRA 383 and *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1, [2011] 2 AMR 680, [2012] 5 MLRA 377.

**[17]** Section 26A of the ATIPSOM states that any person who carries out smuggling of migrants commits an offence.

**[18]** The expression "smuggling of migrants" is defined in s. 2. It includes:

(i) arranging, facilitating or organising, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful; and

(ii) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in para. (a).

**[19]** A smuggled immigrant is defined in s. 2 as a person who is the object of the act of smuggling of migrants, regardless of whether that person participated in the act of smuggling of migrants.

**[20]** To establish the charge against the accused persons, it is thus incumbent on the prosecution to prove:

(i) that the seven migrants were smuggled migrants; and

(ii) that the accused persons in furtherance of their common intention had assisted in the smuggling of the seven migrants out of Malaysia.

**Analysis And Findings**

**[21]** In arguing that the evidence in their favour is sufficiently strong, prosecution relied heavily on the seven depositions of the seven migrants wherein they have stated that they wanted to return to Indonesia and admitted that they have no valid permit to remain as well as had overstayed in Malaysia. According to the seven migrants, they knew the first accused because it was the first accused who had informed them that he could make the necessary arrangements such as providing them with a temporary accommodation in Putrajaya and obtain the special pass chop for their passports, COVID-19 screening letters and flight tickets to Indonesia. The seven migrants admitted that they did not go to any clinic for COVID-19 screening nor to any immigration office to obtain special passes chop in their passports. According to the seven migrants, they had given their passports to the first accused for purposes of facilitating their departure from Malaysia.

**[22]** It is submitted that the evidence *via* the seven migrants' depositions were supported by documentary evidence and the WhatsApp conversations screenshots between the seven migrants and the first accused. It is highlighted to the court that upon investigation, it was found that the special pass chop

in the seven migrants' passports were irregular/forged (P156A) and the COVID-19 screening letter was never issued under the names of the seven migrants.

**[23]** The prosecution relied heavily too on the statement given by both the accused persons (P145 and P154) which is said to have supported the evidence of the seven migrants in their respective depositions. P145 and P154 were admitted as evidence pursuant to s. 18A of the Security Offences (Special Measures) Act 2012 (SOSMA). It was highlighted that the mobile number 011-10656446 was registered under the first accused's name and was used by him which is consistent with the depositions and the WhatsApp screenshots obtained from the seven migrants.

**[24]** It is further argued that the prosecution did not have to prove the act of smuggling by both the accused persons as provided in s. 26A and s. 2 of the ATIPSOM as the act of arranging, organising or facilitating directly or indirectly is sufficient to prove the act of smuggling of migrants.

**[25]** Although P145 and P154 were admitted as evidence under s. 18A of the SOSMA, both statements must not be evaluated in isolation but instead it must be evaluated together with the other evidence adduced *ie*, whether the evidence adduced supports the statement made by both the accused persons.

**[26]** Based on their plea of guilty for the offences under s. 6(1)(c) and s. 15(1)(c) of the Act 155, the prosecution contended that the seven migrants have entered and remained in Malaysia without a valid pass and as such pursuant to s. 61 of the AATIPSOM, their depositions were taken before the Magistrate. The prosecution further adduced the "Perintah Tahan Usir" (PTU) attached together with the seven migrants' depositions as provided under ss. 32, 33 and 56(2) of the Act 155 and as such the pre-conditions of the admissibility of the depositions have been satisfied. Premised on the seven migrants' depositions the prosecution then argued that in their attempt to exit Malaysia illegally, all the seven migrants are smuggled migrants as defined under s. 2 of the ATIPSOM.

**[27]** On the other hand, it is the defence's case and the question that arose was whether the seven migrants are smuggled migrants when at the time they were in the process of exiting Malaysia, the Malaysian government had initiated a programme known as "Program Rekalibrasi Pulang" (hereinafter referred to as "the progamme"). It is not disputed that the programme was launched and executed on 16 November 2020 to 30 June 2020 in West Malaysia. PW17, the investigating officer, testified that in this programme, migrants who have been charged for offences for not having a valid pass and overstayed in Malaysia were qualified to participate. D165 is a chart issued by the Immigration Department *via* their website which underlined or displayed how the programme worked where the migrants could just walk-in to the special counter meant for the programme to participate and PW17 affirmed that no registration was required.

**[28]** PW17 affirmed that at the material time all the seven migrants were eligible to participate in the programme and the programme was in progress. The evidence of PW17 in cross-examination are as follows:

Soalan: Saya katakan dalam tempoh tersebut iaitu 16 November 2020 sehinggalah 30 Jun 2022 saya kata kan Jabatan Imigresen Malaysia telah menganjurkan satu program yang dinamakan Program Rekalibrasi Pulang khas untuk PATI?

SP17: Setuju

Soalan: Maka, jika kita rujuk silang 16 November 2020 sehingga 30 Jun 2022, dengan pertuduhan kes kita iaitu pada 22.6.2021, saya kata kan sewaktu migran-migran ditangkap, anakguam saya ditangkap, OKT2 ditangkap, mereka ditangkap dalam lingkungan tarikh program rekalibrasi tersebut?

SP17: Setuju

Soalan: Warga asing yang layak menyertai program rekalibrasi tersebut adalah samada, yang melakukan kesalahan Seksyen 6(1)(c) Akta Imigresen 1963 atau Seksyen 15(1)(c) Akta Imigresen 1963 atau Peraturan 39(b) Peraturan-Peraturan Imigresen 1963 dalam bahasa mudah tinggal di Malaysia tanpa Pas dan Permit yang sah samada tinggal lebih masa atau langgar syarat Pas, PATI-PATI ini boleh menyertai program Rekalibrasi pulang tersebut setuju puan?

SP17: Setuju Yang Arif

Soalan: Tengok D165 kita pergi ke helaian kedua di bahagian Carta, setuju dengan saya kalau kita tengok carta, carta ini menggariskan/memaparkan perjalanan program rekalibrasi pulang ini dalam bentuk interaktif yang semua orang faham?

SP17: Setuju

Soalan: Jadi kalau kita rujuk carta di bahagian kiri mukasurat helaian itu, adalah perkataan mula dan ada arrow ke bawah kemudian saya kata kan tertulis hadir secara walk in ke kaunter khas program rekalibrasi pulang KLIA1/2, Stulang Laut, Pasir Gudang, setuju?

SP17: Setuju Yang Arif

Soalan: Berdasarkan keterangan yang diberikan oleh Jabatan Imigresen Malaysia di dalam D165 ini, saya kata kan PATI yang ingin menyertai ataupun migran yang ingin menyertai program Rekalibrasi pulang ini, dia hanya perlu walk in tak perlu mendaftar?

SP17: Setuju

Soalan: Kita rujuk silang keadaan ini dengan keadaan migran-migran dalam kes kita yang dikata kan individu-individu seramai 7 orang itu, yang dikatakan migran melibatkan OKT1 ini, saya katakan mereka juga di dalam tempoh rekalibrasi pulang ini mereka juga boleh walk ini ke kaunter KLIA nak sertai program rekalibrasi pulang setuju puan?

SP17: Setuju

Soalan: Di saat mereka ditangkap, saya kata kan mereka masih lagi berada di lingkungan ataupun kecualian yang diberiakn oleh Kerajaan Malaysia melalui Jabatan Imigresen Malaysia, iaitu berada di dalam program Re kalibrasi Pulang setuju?

SP17: Setuju

Soalan: Rujuk P159 gambar no. 13. P159 adalah deposisi Bulkaini. Setuju dengan saya dalam gambar no. 13 tersebut, saya katakan ada surat tentang program rekalibrasi telah diforward atau pun dimajukan oleh Bg Jefri kepada Bulkaini, setuju?

SP17: Setuju

Soalan: Sekiranya migran-migran terfikir nak join program ini, bercadang nak join, ataupun ingin join, sedang ingin join, maksudnya belum nak join tapi terfikir nak join, mereka semua itu termasuk dalam kecualian yang telah digariskan dan dibenarkan oleh Kerajaan Malaysia, Kementerian Dalam Negeri dan juga Jabatan Imigresen Malaysia, setuju?

SP17: Setuju.

**[29]** Pertinently, in the screenshots of the WhatsApp communication between one of the seven migrants (Bulkaini) (P159 picture no. 13) with the first accused, there was a letter relating to the programme forwarded to Bulkaini by the first accused. Reasonable doubt arises herein. The question is, whether the first accused for that matter was facilitating the exit of the seven migrants from Malaysia illegally when there was a letter relating to the programme which legitimise the return of all illegal immigrants or known as PATI, forwarded by the first accused to one of the seven migrants (Bulkaini). This letter somehow was not extracted and produced by the prosecution and what the first accused had to say or had said regarding this letter was not extracted by PW17, the investigating officer. The reasonable doubt is further compounded by the fact that even in the first accused's statement, he had stated that his purpose of creating the WhatsApp group was to inform migrants who contacted him, any information regarding the programme as well as informing them the vacancies of the STO (Sistem Temujanji Online) in any of the immigration office. In fact, upon perusing the voluminous extracts of the WhatsApp communications of the seven migrants, it is apparent that there were discussions between them regarding the programme. In other words, it can safely be inferred that the seven migrants did intend to participate in the programme with the assistance of the first accused.

**[30]** No evidence was adduced by the prosecution to show that the seven migrants were not entitled to the protection or exception under the programme. PW17 admitted that it was not within her jurisdiction or she did not have knowledge whether the seven migrants were registered under the programme and this court is of the view that the evidence from the relevant

division relating to the programme ought to have been called to testify and verify as to the seven migrants exit from Malaysia. As such, with the evidence from PW17 as stated in the above and the WhatsApp conversations of the seven migrants coupled with the letter relating to the programme forwarded by the first accused, reasonable inference tilt in favour of the first accused in that he cannot be gainsaid to be smuggling by assisting or facilitating the seven migrants' exit from Malaysia illegally under s. 2 of the ATIPSOM.

**[31]** This court further finds that the status of the seven migrants either as illegal migrants/without legal pass or who had overstayed in Malaysia are also doubtful although they have pleaded guilty to the offences. In regard to the migrant Maridar (B1) named in the charge, there was an audio recording of his voice (affirmed by PW17 as Maridar's voice) whereby Maridar did mention that he had given his passport to the grab driver who drove them to the airport (PW7) (audio recording P112 (A)). The passport belonging to Maridar was never confiscated. PW17 only relied on the fact that there were no movement records of Maridar and as such he was taken as an illegal migrant.

**[32]** The same case happened in regards to the migrant named Lukman (B2) in the charge. PW17 relied only on the movement record (P116 (7) which shows no record of Lukman's movement. However, in reference to Lukman's deposition and the WhatsApp conversation screenshot prepared by PW17 herself, PW17 admitted that there was Lukman's passport with a special chop sent by Lukman to "TGK BASRI". PW17 further agreed that Lukman's passport was also given to SP7. Nevertheless, despite the fact that the passports belonging to both Maridar and Lukman exist, their passports were never confiscated and their passports numbers were never recorded or noted to verify whether both Maridar and Lukman possessed valid travelling documentations.

**[33]** It must be highlighted that the prosecution's contention that the special chop in the passports is fake or forged was never proven. All PW17 had to say was that the chop was "tidak teratur". In fact, where the other migrants are concerned *ie*, Zulhadi, Bulkaini, Mahdi, Muktaruddin and Teuku Zulfikar, the copy of their passports have the special chops which were still valid at the time they were arrested.

**[34]** The prosecution relied on a memo from the investigation, operation and prosecution division to say that the special chops were forged but PW17 testified that in regard to the special pass chop, it is for someone from the division which handled the programme that could verify them. PW17 further admitted that the fact the special pass chops are irregular or "tidak teratur" does not mean the special passes were forged. It must also be borne in mind that none of the seven migrants were charged for forging the "endorsement" of the special pass chops on their passports. The seven migrants must be

given the benefit of the doubt. If the seven migrants have valid special pass chops which can only be verified by someone from the division which handled the programme and they were applying to participate in the programme, can they still be considered as smuggled migrants under the law when they seek assistance from the first accused to exit Malaysia through a valid channel?

**[35]** PW17 for that matter agreed that at the time the seven migrants were at KLIA2 to return home, they were having possession of flight tickets bought by the first accused earlier and PW17 further admitted that by having a flight tickets which were purchased earlier, the seven migrants have fulfilled the conditions of the programme to be returned to their country. PW17 testified that since there was no necessity for the seven migrants to register to participate in the programme and all the seven migrants had to have were their passports and flight tickets to return to their homeland, they came under the 'exception' of the programme. PW17 testified as follows:

Soalan: Dan jika saya katakan kepada Puan, warga-warga asing yang layak menyertai program rekalibrasi pulan tersebut adalah sama ada yang melakukan kesalahan seksyen 6(1)(c) akta imigresen 1963 atau seksyen 15(1)(c) akta imigresen 1963 atau akta peraturan 39(b) peraturan-peraturan imigresen 63, dalam bahasa mudah nak bagi semua orang faham, tinggal Malaysia tanpa pas dan permit yang sah, sama ada tinggal lebih masa atau melanggar syarat pas. PATI-PATI ini boleh menyertai Program Rekalibrasi Pulang ini. Setuju puan?

SP17: Setuju Yang Arif

...

Soalan: Dan mereka telah hadir ke KLIA atau ke lapangan terbang tersebut pada Ketika itu dengan tiket yang tidak dipertikaikan dibeli oleh OKT1, setuju?

SP17: Setuju Yang Arif

Soalan: Dan kalau puan setuju dengan soalan saya, saya kata kan tiket yang dibeli oleh OKT1 merupakan tiket yang dibeli lebih awal menepati syart-syarat yang telah digariskan di halaman kedua di bahagian II, di bahagian catatan II (P165), setuju

SP17: Setuju Yang Arif

Soalan: Maka pada ketika itu, akibat puan telah bersetuju dengan soalan saya, maka pada ketika itu, imigran-imigran ini tertakluk pada bawah satu 'exception' ataupun pengecualian dari segi program rekalibrasi pulang ini, sebab mereka tidak perlu mendaftar, mereka hanya perlu hadir, bawa passport, bawa tiket yang kami tidak pertikaikan dibeli oleh OKT1, maka mereka tertakluk di bawah pengecualian ini. Setuju puan?

SP17: Setuju Yang Arif

Soalan: Tetapi faktanya, malangnya puan, mereka ini tidak dapat terbang pada hari itu, betul Puan?

SP17: Setuju Yang Arif

Soalan: Mereka Kembali ke rumah, tempat kejadian dan ditangkap di situ, setuju puan?

SP17: Setuju Yang Arif

Soalan: Di saat mereka ditangkap, saya kata kan mereka masih lagi berada di dalam lingkungan ataupun pengecualian oleh Kerajaan Malaysia melalui Jabatan Imigresen Malaysia, iaitu berada dalam program rekalibrasi pulang, setuju?

SP17: Setuju

**[36]** In the case of *Mohammad Jafor Hossain lwn. PP* [2017] 8 CLJ 717, the applicant filed a revision to the High Court relating to his conviction for not having a valid pass, an offence under s. 6(1) of the Act 155. The facts revealed that at the material time, the applicant had registered with the MyEG programme, a programme for hiring and relocation of illegal immigrants (PATI) introduced by the government of Malaysia to enable the PATI to continue working with their employer and by granting them with a temporary visiting pass. Ghazali Cha J (as he then was) held:

> (1) Walaupun tidak lagi memiliki permit pekerjaan yang sah, akan tetapi, selepas didaftarkan dengan MyEG, maka status pemohon sebagai PATI di negara ini telah berubah kepada PATI yang dibenarkan untuk tinggal di negara ini sehingga proses pendaftaran oleh MyEG selesai. Dalam erti kata lain, setelah mendaftarkan dirinya dan membayar RM1134.52 kepada MyEG untuk program 'rehiring' tersebut, pemohon bukan lagi seorang PATI.
>
> (2) Pihak Imigresen tidak boleh menuduh dan mendakwa pemohon selepas dia mengikuti program 'rehiring' ini. Jika tidak, pihak Kerajaan boleh dipertanggungjawabkan sebagai menipu PATI kerana masih menangkap dan menuduh mereka di mahkamah walaupun setelah mereka mendaftar diri dengan program dan membuat bayaran-bayaran tertentu.

**[37]** According to D165, there was no necessity for the seven migrants to register. In view of the fact that there were special pass chops on B2-B6 passports and documentary evidence to show that they had the STOs under the programme and applying the case of *Mohammad Jafor Hossain* (*supra*), this court finds that the seven migrants cannot be gainsaid to be smuggled migrants in their effort to return to their homeland as they came under the exception of the programme. PW17 agreed that she knew of the programme through the documents seized during the raid and yet no further investigation was done to rebut the defence raised herein. The failure on the part of the prosecution to rebut the evidence adduced in favour of the seven migrants relating to the programme is therefore fatal.

**[38]** The first accused was also alleged to have prepared or obtained the COVID-19 letter for all the seven migrants from the company known as Gribbles. But nowhere in the evidence that disclosed or proved this allegation. Firstly, the first accused was never caught having possession of the COVID-19 letters from Gribbles. Nowhere in the WhatsApp conversations disclosed that the first accused had given the same letter to any of the seven migrants. PW17 for that matter admitted that even she did not know any connection between the first accused and the COVID-19 letters from Gribbles. The fact proven is that the COVID-19 letters do not belong to any of the seven migrants and no evidence was adduced to show that the first accused went to Gribbles to get the COVID-19 letters for the seven migrants.

**[39]** This court further finds that there was no evidence to show that it was the first accused who had prepared the "Surat Perjalanan Laksana Passport" (SPLP) or the special pass chops found in the passports belonging to the seven migrants. In fact, from the screenshots of the WhatsApp conversations from the four depositions out of the seven migrants (P158, P159, P160 and P163), it is apparent that they were the ones who had sent their passports photographs with the special pass chops, their SPLP photographs, the STO letters with particulars under the programme, to the first accused. The screenshots of the WhatsApp conversations and the documents attached therein negate the four migrants' allegations in their depositions that it was the first accused who had prepared the documents for them or the other three migrants.

**[40]** The only evidence available is the fact that it was the first accused who had bought the flight tickets earlier for the seven migrants. This piece of evidence and admission by the first accused cannot be said to be proof that the first accused was facilitating the exit of the seven migrants illegally or that the first accused knew or had reason to believe that he was facilitating their exit illegally as it is clear from the situation as disclosed in the evidence, the seven migrants are confirmed to have come under the exception of the programme and having a return flight ticket is one of the conditions to return home under the programme.

**[41]** In one of the screenshots (P122, E157 picture no. 29) of the seven migrants for that matter, there was an exit memo wherein the purpose is stated to be "Program Rekalibrasi Pulang". Again, this memo was never extracted by PW17. It must be stated and observed that documents relating to the programme found in the seven migrants' handphone which could be in favour of the defence was never extracted during the investigation. This court finds that the investigation conducted by PW17 was not objective in nature. It was one-sided and the evidence which was favourable to the first accused was somehow 'ignored'. PW17's omission had compromised the defence's case and that has created doubts in the prosecution's case. There were gaps that exist in the unfolding of the prosecution's case in its entirety

A and doubts which exist and not negated by the prosecution calls for the invocation of s. 114(g) of the Evidence Act 1950 in that evidence which could be and is not produced would if produced be unfavourable to the prosecution.

B **[42]** Since the programme is a programme allowing the seven migrants to return to their country legally, and there was evidence to show that the first accused did forward the letter relating to the same, this court finds that the first accused has not committed any act of smuggling as defined under s. 2 of the ATIPSOM by using any illegal or unlawful means to facilitate the departure of the seven migrants.

C **[43]** In regards to the second accused, the only evidence that the prosecution relied on is the statement by the first accused that he had seek assistance from the second accused relating to the seven migrants' return to their country. It was said that the second accused was responsible in "setting-up" the immigration counter at KLIA2. However, this court finds that
D nowhere in the evidence adduced before the court to show the involvement of the second accused herein.

**[44]** Firstly, PW17 affirmed that none of the seven migrants knew or mentioned the name of the second accused or her involvement in the present
E case, in their depositions. Secondly, nowhere in the evidence that shows the second accused had prepared forged special pass chops or the COVID-19 letter for the seven migrants. PW17 affirmed this fact too. Thirdly, the second accused was never involved or mentioned in any of the WhatsApp conversations between the seven migrants and the first accused. Fourthly, no
F documents belonging to any of the seven migrants were found with the second accused. Fifthly, the second accused did not provide any shelter to the seven migrants and neither did she provided transportation to KLIA2 for the seven migrants.

**[45]** No evidence was adduced to show that the second accused had in fact
G made arrangement for 'setting-up' the counter at the KLIA2. Instead, according to the depositions of Maridar (P157) and Zulhadi (P158), they were dealing with PW8 who was a police personnel at the KLIA2. PW8 never identified the second accused in court as the person who was involved in the 'setting-up' of the immigration counter at the KLIA2. No evidence was adduced to show that the second accused was at the KLIA2 immigration
H counter to facilitate the exit of the seven migrants. Pertinently, no evidence was adduced to show any communication between the first accused and the second accused relating to the seven migrants' exit or whatsoever.

**[46]** No investigation was carried out by PW17 to disprove the defence's
I version of fact. This court finds that the manner in which PW17 had conducted her investigation left many stones unturned and material gap exists (see: *Muhammad Hafiz Mukrimin Abdulkeh lwn. PP & Satu Lagi Rayuan* [2022] 4 CLJ 329; [2022] MLRAU 39).

**[47]** This court finds that the prosecution has failed to prove that the second accused and the first accused had in any way communicated or planned or arranged or facilitated the exit of the seven migrants illegally. Therefore, it is the finding of this court that the second accused cannot be said to have known or had reason to believe that the seven migrants' exit was illegal or unlawful.

**[48]** It is well-settled principle that common intention within the meaning of s. 34 of the Penal Code implied pre-arranged plan and the criminal act was done in pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence. However, the critical circumstance is that the said plan must precede the act of constituting the offence (see: *Yugarajan Letchimanasamy & Anor v. PP & Another Appeal* [2020] 7 CLJ 372; [2020] MLRAU 136). Based on the analysis elaborated in the above, this court finds the prosecution has failed to prove common intention of both accused persons in the alleged act of smuggling the seven migrants.

**[49]** It is the finding of this court that there were gaps that exist in the unfolding of the prosecution's case in its entirety. Reasonable doubts which exist are not negated by the prosecution. The requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Premised on the evidence adduced, this court is not convinced of the guilt of both accused persons. They are entitled to an acquittal as there are material gaps which raised reasonable doubts as to their guilt. As the onus of proving the guilt of both the accused persons lies throughout on the prosecution, this court finds that the whole evidence left this court in real state of doubt and as such the prosecution has failed to satisfy the onus of proof which lies upon them.

## Conclusion

**[50]** Premised on the above analysis and findings, the accused persons were discharged and acquitted without them having to enter their defence.